UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYAL BOUTIQUE USA INC.,

Plaintiff,

-against-

XUEPING LIN,

Defendant.

Index No.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, **ROYAL BOUTIQUE USA INC.** ("Royal Boutique USA"), by its attorneys, as and for its Complaint against Defendant **XUEPING LIN** ("Lin"), alleges as follows.

NATURE OF ACTION

1. This is a civil action for (1) false designation of origin under 15 U.S.C. § 1125(a); (2) a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the Trademark Act of the United States, 15 U.S.C. § 1051 *et seq.* that Plaintiff is the rightful owner of the PERFOTEK trademark; (3) common law trademark infringement under New York state law; (4) trademark dilution under New York General Business Law ("GBL") § 360–1; (5) unfair competition under New York state law; and (6) deceptive practices under GBL § 349. Plaintiff seeks permanent injunctive relief, actual or statutory damages, recapture of profits, reasonable attorneys' fees and costs and such other and further relief as this Court deems just and proper.

PARTIES

2. Plaintiff Royal Boutique USA is a Florida Corporation with a principal place of at 1035 NW 7th Terrace, Fort Lauderdale, Florida, 33311.

3. Defendant is an individual who transacts business out of an office located at 401 North Tryon St. #1132, Charlotte, North Carolina, 28202.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 (Trademark Act of the United States), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1338 (patent, trademark and copyright), 28 U.S.C. § 2201 (creation of remedy), and 28 U.S.C. § 1367 (supplemental jurisdiction).

5. This Court has personal jurisdiction over Defendant under the New York State Long Arm Statute (New York Civil Practice Law §302 et seq.) because Defendant transacts business in New York and in this judicial district and/or solicits business from, and markets and advertises his merchandise to, residents in this judicial district.

6. Specifically Defendant sells his infringing goods through Amazon.com, which is a fully interactive internet marketplace that permits prospective customers to purchase his infringing, counterfeit goods online.

7. Customers in New York can purchase the infringing goods on Amazon.com, and have them delivered to addresses in New York.

8. Upon information and belief, Defendant actively solicits and derives revenues from customers located in the State of New York and in this District, through Amazon.com.

9. Upon information and belief, Defendant's activities have allowed him to accrue an unknown amount of unlawful profits while simultaneously depriving Plaintiff of the same.

10. Upon information and belief, Defendant has generated thousands of dollars in profits from selling his infringing goods.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 for the same reasons that personal jurisdiction over Defendant in New York is proper and because a

substantial part of the events giving rise to the claims herein occurred in this judicial district.

PLAINTIFF'S TRADEMARKS AND GOODS

12. Royal Boutique USA is the owner, by assignment from its predecessor, Royal Boutique Inc., of the commonlaw trademark "PERFOTEK".

13. Royal Boutique USA is also the owner, by assignment from its predecessor, Royal Boutique Inc., of trademark application Ser. No. 87283852 for the trademark "PERFOTEK", currently pending before the United States Patent and Trademark Office ("USPTO"). That application was filed on December 29, 2016 and was published for opposition by the USPTO on May 9, 2017.

14. Royal Boutique USA and its predecessor, Royal Boutique Inc. have been using the commonlaw PERFOTEK trademark since January, 2016 to sell, advertise and market products in the sports and health field, including a variety of nutritional supplements and supportive therapeutic braces, such as knee braces and waist-trimming exercise belts.

15. Since January, 2016, Plaintiff and its predecessor have extensively advertised goods with the PERFOTEK trademark in various social media websites, print advertising, radio advertising and cable television.

16. Since January, 2016, Plaintiff and its predecessor have sold their products bearing the PERFOTEK trademark primarily to wholesale and retail purchasers in the United States and abroad and direct to consumers through the Amazon.com online marketplace.

17. Since January, 2016, Plaintiff has enjoyed overwhelming success in its sales. For example, the online reviews on Amazon.com of Plaintiff's waist-trimming exercise belts have garnered an average of four (4) stars out of five (5), based on over 250 reviews, with sixty (60) percent of the reviewers giving the waist-trimming exercise belts the highest rating of five (5)

stars. Moreover, Plaintiff's waist-trimming exercise belts have generated tens of thousands of dollars in sales.

18. By virtue of the success of Plaintiff's waist-trimming exercise belts sold under the PERFOTEK trademark, consumers have come to associate the style and quality of the waist-trimming exercise belts sold by Plaintiff with the PERFOTEK trademark.

19. By virtue of the success of Plaintiff's waist-trimming exercise belts sold under the PERFOTEK trademark and Plaintiff's extensive advertising of PERFOTEK goods, consumers have come to associate PERFOTEK waist-trimming exercise belts with a particularly high quality and style.

DEFENDANT'S INFRINGING USE OF THE TRADEMARKS

20. Beginning on or about January, 2017, Defendant started selling waist-trimming exercise belts on Amazon.com that are substantially inferior in quality and function than the waist-trimming exercise belts sold by Plaintiff.

21. Defendant advertised these waist-trimming exercise belts by virtually copying the Plaintiff's Amazon.com webpage, including copying the look and feel of Plaintiff's webpage, the PERFOTEK trademark and the images of the waist-trimming exercise belts used by Plaintiff.

22. The substandard quality waist-trimming exercise belts garnered instant criticism on Amazon.com.

Most Recent Customer Reviews

★☆☆☆☆ **This is ridiculous**
I'm giving this item an one, I would give it a zero because I'm highly disappointed. I lost the first one, so I repurchase it. Read more ›
Published 4 hours ago by Samantha

★☆☆☆☆ **Do NOT recommend**
Waste of Money it is Nothing like the picture. I saw a review that says they can wrap the belt around them almost 3 times they must be super skinny I am 180 pounds and barealy... Read more ›
Published 7 hours ago by Amazon Customer

★☆☆☆☆ **THIS WASN'T THE BRAND NAME PRODUCT THAT WAS ADVERTISED. ...**
THIS WASN'T THE BRAND NAME PRODUCT THAT WAS ADVERTISED. It wasn't brand name, didnt have the label as advertised. Definitely returning.
Published 2 days ago by Amazon Customer

23. There was good reason for these criticisms because Defendant had shipped clearly inferior waist-trimming exercise belts.

	Plaintiff's Original Defendant's Fake

24. The negative criticisms were lodged on Plaintiff's Amazon.com webpage such that potential customers could see the negative reviews. Naturally, these negative reviews affected Plaintiff's sales of its waist-trimming exercise belts and have continued to negatively affect Plaintiff's sales since Defendant started selling his inferior waist-trimming exercise belts on Amazon.com.

25. To make matters worse, Defendant had the audacity to file for a trademark

application for Plaintiff's trademark in "PERFOTEK" on March 14, 2017 even though Defendant was well aware that Plaintiff had been advertising goods (particularly waist-trimming exercise belts) with this trademark well before Defendant started selling his goods.

26. Defendant's application was given Serial No. 87370229 and has been approved for publication for opposition.

27. Plaintiff made several demands of Defendant to cease and desist his use of Plaintiff's trademark in PERFOTEK and to withdraw his fraudulent trademark application, including on March 30, 2017 and May 30, 2017.

28. As of the date of the filing of this complaint, Plaintiff has yet to receive any response from Defendant or any indication on Amazon.com that Defendant has stopped selling his waist-trimming exercise belts using Plaintiff's PERFOTEK trademark.

29. Defendant's sales of his infringing goods have substantially undermined Plaintiff's lucrative business in waist-trimming exercise belts by taking away sales from Plaintiff and by harming Plaintiff's reputation by offering cheap quality waist-trimming exercise belts to consumers.

30. Defendant's actions have caused and will continue to cause Plaintiff significant financial losses while simultaneously unjustly enriching them by the false association created by his use of the PERFOTEK trademark.

FIRST CLAIM FOR RELIEF
(False Designation of Origin Under 15 U.S.C. §1125(a))

31. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 30 above as if fully set forth herein.

32. Plaintiff is the owner of the common law PERFOTEK trademark.

33. The PERFOTEK trademark is inherently distinctive and/or has acquired

distinctiveness.

34. Defendant's use of copies or simulations of the PERFOTEK trademark in connection with Defendant's manufacture, distribution, offer for sale and/or sale of his infringing products is likely to cause and is causing confusion, mistake and deception among the general purchasing public as to the approval and/or sponsorship of the infringing products, and is likely to deceive the public into believing the infringing products being sold, offered for sale, supplied and/or manufactured by Defendant originates from, are associated with or are otherwise authorized by Plaintiff, all to the damage and detriment of Plaintiff.

35. Plaintiff' sale of the infringing products is likely to cause confusion to the general purchasing public.

36. By misappropriating and using the PERFOTEK trademark, Defendant misrepresents and falsely describes to the general public the origin and source of the infringing products and creates a likelihood of confusion by consumers as to the certification of such merchandise.

37. Defendant's unlawful, unauthorized and unlicensed manufacture, supply, offer for sale and/or sale of the infringing products creates express and implied misrepresentations that the infringing products were authorized or approved by Plaintiff, all to Defendant's profit and Plaintiff's injury.

38. Defendant's aforesaid acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Defendant's manufacture, supply, offer of sale and/or sale of the infringing products in interstate commerce constitutes a false designation of origin.

39. As a direct and proximate result of Defendant's aforementioned wrongful actions, Defendant has caused irreparable injury to Plaintiff. Defendant, by (i) injuring the value of the

PERFOTEK trademark and (ii) causing loss and damage to Plaintiff's rights in the PERFOTEK trademark, has injured Plaintiff in a manner as to which Plaintiff has no adequate remedy at law.

40. Unless Defendant's unlawful actions as alleged herein are immediately enjoined, Defendant will continue to cause damage to Plaintiff and its PERFOTEK trademark and Plaintiff will continue to suffer irreparable harm and injury.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment – Ownership of Trademarks)

41. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 40 above as if fully set forth herein.

42. A case or controversy exists between Plaintiff and Defendant concerning ownership of the PERFOTEK trademark.

43. Plaintiff has been using the PERFOTEK trademark on various products since January, 2016, including on waist-trimming exercise belts.

44. Plaintiff filed its trademark application on December 29, 2016, which has since been published for opposition by the USPTO on May 9, 2017.

45. Defendant did not start using the PERFOTEK trademark since January 2017.

46. Defendant filed his application for the exact same PERFOTEK trademark on March 14, 2017.

47. Because Plaintiff extensively used, advertised and sold goods branded with the PERFOTEK trademark and because Plaintiff's use of the PERFOTEK trademark preceded Defendant's use of the same mark, Plaintiff is entitled to declaration that it is the rightful owner of the PERFOTEK trademark.

THIRD CLAIM FOR RELIEF
(Common Law Trademark Infringement)

48. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 47 above as if fully set forth herein.

49. Plaintiff is the owner of all rights to the PERFOTEK common law trademark.

50. Defendant knowingly and intentionally reproduced, copied, and imitated the PERFOTEK trademark and used such reproductions, copies or imitations to advertise, market, sell and offer to sell goods similar to Plaintiff's goods to consumers, including Plaintiff's customers.

51. Defendant's actions have been deliberate and committed with knowledge of Plaintiff's rights in the PERFOTEK trademark, as well as with bad faith and the intent to cause confusion, mistake and deception.

52. Plaintiff' manufacture, supply, sale and/or offer for sale of the infringing products, without Plaintiff's consent, constitutes common law trademark infringement under the laws of the State of New York.

53. Such use is likely to cause confusion, deception and mistake among the consuming public as to the source, approval or sponsorship of the infringing products.

54. As a direct and proximate result of Defendant's unlawful and infringing actions as alleged herein, Plaintiff has suffered substantial and irreparable injury, loss and damage to its rights in and to the PERFOTEK trademark, for which Plaintiff has no adequate remedy at law.

55. Unless Defendant's unlawful and infringing actions as alleged herein are immediately enjoined, Defendant will continue to cause damage to Plaintiff and its PERFOTEK trademark and Plaintiff will continue to suffer irreparable harm and injury.

FOURTH CLAIM FOR RELIEF
(Trademark Dilution under GBL § 360–1)

56. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 55 above as if fully set forth herein.

57. Plaintiff has used the PERFOTEK trademark since January 2016 and has established trademark rights in all related and associated marks.

58. Plaintiff is the exclusive owner of the distinctive PERFOTEK trademark.

59. The PERFOTEK trademark is inherently distinctive and have been in use in commerce since January, 2016.

60. The PERFOTEK trademark is strong, famous, and well-known, and has garnered widespread publicity and public recognition in New York and elsewhere worldwide. As such, the PERFOTEK trademark has acquired distinctiveness in the marketplace.

61. Defendant's use of the PERFOTEK trademark in the marketing, advertising, offering for sale and selling of his infringing goods constitutes commercial use in commerce of the PERFOTEK trademark.

62. Plaintiff has not authorized or licensed this use.

63. Defendant's use of the PERFOTEK trademark in the marketing, advertising, offering for sale and selling of his infringing goods actually dilutes, or is likely to dilute, the distinctive quality of the PERFOTEK trademark, and to lessen the capacity of the PERFOTEK trademark to identify and distinguish Plaintiff's goods.

64. Plaintiff' unlawful use of the PERFOTEK trademark causes blurring and tarnishment in the minds of the consumers between Plaintiff and Defendant, thereby lessening the value of the PERFOTEK trademark as a unique identifier of Plaintiff's goods.

65. By the acts described above, Defendant has intentionally and willfully diluted the

distinctive quality of the PERFOTEK trademark in violation of New York common law.

66. Plaintiff has been damaged by Defendant's acts complained of in an amount to be determined at trial, and if Defendant's conduct is allowed to continue, Plaintiff and its goodwill and reputation will continue to suffer immediate, substantial and irreparable injury that cannot be adequately calculated and compensated in monetary damages.

FIFTH CLAIM FOR RELIEF
(Unfair Competition Under New York State Law)

67. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 66 above as if fully set forth herein

68. Plaintiff has used the PERFOTEK trademark since January, 2016 and has established trademark rights in all associated and related marks.

69. By making unauthorized use in commerce of the PERFOTEK trademark, Defendant is likely to cause confusion, mistake, or deception as to the affiliation or connection of Defendant with Plaintiff and as to the sponsorship or approval of Defendant's infringing goods by Plaintiff.

70. Defendant's distributing, marketing, advertising, offering for sale and selling of his infringing goods causes confusion and mistake, deceives and misleads the purchasing public, trades upon Plaintiff's high quality reputation, and improperly appropriates to Defendant the valuable goodwill of Plaintiff.

71. By the acts described above, Defendant has intentionally and willfully infringed the PERFOTEK trademark in violation of New York common law.

72. Plaintiff has been damaged by Defendant's acts complained of in an amount to be determined at trial, and if Defendant's conduct is allowed to continue, Plaintiff and its goodwill and reputation will continue to suffer immediate, substantial and irreparable injury that cannot be

adequately calculated and compensated in monetary damages.

SIXTH CLAIM FOR RELIEF
(Deceptive Practices Under GBL § 349)

73. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 72 above as if fully set forth herein.

74. Plaintiff has used the PERFOTEK trademark since January, 2016 and has established trademark rights and valuable goodwill in the PERFOTEK trademark.

75. Defendant, through his marketing, advertising, offering for sale and selling of his infringing goods is causing a likelihood of confusion as to the source, sponsorship, affiliation, connection, association or approval of Defendant by or with Plaintiff.

76. Plaintiff has been damaged by Defendant's acts complained of in an amount to be determined at trial, and if Defendant's conduct is allowed to continue, Plaintiff and its goodwill and reputation will continue to suffer immediate, substantial and irreparable injury that cannot be adequately calculated and compensated in monetary damages.

77. Defendant's infringing acts have been committed with the intent to cause confusion or mistake or to deceive.

78. Plaintiff is entitled to monetary damages and injunctive relief prohibiting Defendant from using the PERFOTEK trademark or any other trade name, trademark, service mark or domain name that is likely to be confused with the PERFOTEK trademark or otherwise unfairly competing with Plaintiff. Without preliminary and permanent injunctive relief, Plaintiff has no means by which to control the continuing injury to the reputation and goodwill associated with the PERFOTEK trademark.

79. No amount of money damages can adequately compensate Plaintiff if it suffers damage to its reputation and associated goodwill through the false and unauthorized use by

Defendant of Plaintiff's PERFOTEK trademark.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. Declaring that Plaintiff is the rightful owner of the PERFOTEK trademark and cancelling Defendant's pending trademark application Serial No. 87370229;

2. Permanently enjoining and restraining Defendant, and his respective companies, subsidiaries, affiliates, divisions, officers, directors, principals, servants, employees, successors and assigns, and all those in active concert or participation with them from:

(a) imitating, copying or making unauthorized use of the PERFOTEK trademark;

(b) manufacturing, importing, exporting, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any goods bearing any unauthorized reproduction, copy, counterfeit or colorable imitation of the PERFOTEK trademark or any mark or design substantially indistinguishable from or confusingly similar to the PERFOTEK trademark;

(c) using any unauthorized colorable imitation of the PERFOTEK trademark in connection with the manufacture, promotion, advertisement, display, sale, offering for sale, production, import, export, circulation or distribution of any goods in such a manner as to relate or connect, or tend to relate or connect, such goods of Defendants in any way with Plaintiff or to any goods sold, sponsored, approved by, or connected with Plaintiff;

(d) engaging in any other activity constituting an infringement of the PERFOTEK trademark or of Plaintiff's rights in, or its right to use or exploit such trademark, and the reputation and goodwill associated therewith;

(e) making any statement or representation whatsoever, with respect to the infringing and counterfeit goods at issue, that falsely designates the origin of the goods as those associated with Plaintiff, or that is false or misleading with respect to Plaintiff;

(f) engaging in any other activity, including, but not limited to, the effectuation of assignments or transfers of his interests in goods bearing any unauthorized reproduction, copy, counterfeit or colorable imitations of the PERFOTEK trademark and/or any mark or design substantially indistinguishable from or confusingly similar to the PERFOTEK trademark, the formation of other corporations, partnerships, associations or other entities or the utilization of any other devices, for the purpose of circumventing, evading, avoiding or otherwise violating the prohibitions set forth in subsections 2(a) through 2(e) above; and

(g) destroying, altering, disposing of, removing, moving, transporting, tampering with or in any manner secreting any and all business records, including invoices, correspondence, customer/purchase lists, supplier lists, books of account, receipts, art work, designs, sketches or other documentation, and equipment and related paraphernalia relating or referring in any manner to or used or which could be used in or for the manufacture, advertising, receiving, supply, acquisition, importation, purchase, sale or offer for sale, or distribution of any merchandise bearing any unauthorized reproduction, copy, counterfeit or colorable imitation of the PERFOTEK trademark and/or any mark or design substantially indistinguishable from or confusingly similar to the PERFOTEK trademark and any other items in his possession, custody or control, including raw materials, and means of manufacture concerning the manufacturing, acquisition, importation, purchase, shipment, sales or offer for sale or distribution of said unauthorized merchandise.

3. Authorizing Plaintiff to seize, and/or directing Defendant to deliver for destruction, all goods, labels, tags, artwork, prints, signs, packages, dies, plates, molds, matrices and any other means of production, wrappers, receptacles and advertisements in his possession, custody or control bearing any unauthorized reproductions, copies, or colorable imitations of the PERFOTEK trademark or any marks or designs confusingly similar thereto, either individually or in connection with other words, marks or designs.

4. Directing such other relief as the Court may deem appropriate to prevent the trade and public from deriving any erroneous impression that the infringing products manufactured, supplied, offered for sale, sold or otherwise circulated or promoted by Defendants is authorized by Plaintiff or is related to or associated in any way with Plaintiff.

5. Requiring Defendant to account and pay over to Plaintiff, all profits realized by his wrongful acts and directing that such profits be trebled due to Defendant's willful actions.

6. Awarding Plaintiff its costs and reasonable attorneys' and investigatory fees, expenses, costs, together with pre-judgment interest.

7. Awarding Plaintiff such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 9, 2017

Respectfully submitted,

___*/Oleg A. Mestechkin/*______

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